
State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

SHARON BARNES AND TIM BARNES,

Plaintiffs-Appellees,

Supreme Court No. 123661

v

DR. IVANA VETTRAINO, DR. WILLIAM BLESSED,
PROVIDENCE HOSPITAL, AND MICHAEL ROTH, M.D.,

Defendants-Appellants,

and

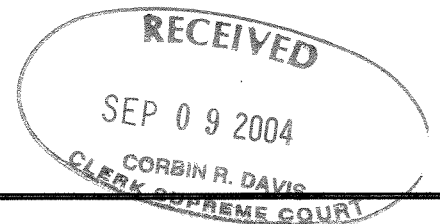
JANE DOE,

Defendant.

Court of Appeals No: 235357
Oakland County Circuit Court No: 00-022089-NH

BRIEF OF DEFENDANT-APPELLANT, MICHAEL ROTH, M.D.

PROOF OF SERVICE



IANNI & ASSOCIATES, P.C.
BY: NICHOLAS A. IANNI, JR. (P34486)
Attorneys for Defendant-Appellant,
MICHAEL ROTH, M.D.
2466 E. Stadium Blvd.
Ann Arbor, MI 48104
(734) 971-1200

GROSS, NEMETH & SILVERMAN, P.L.C.
BY: JAMES G. GROSS (P28268)
Attorneys of Counsel for Defendant-Appellant,
MICHAEL ROTH, M.D.
615 Griswold, Suite 1305
Detroit, Michigan 48226
(313) 963-8200

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STATEMENT OF JURISDICTIONAL BASIS

Defendant, MICHAEL ROTH, M.D., concurs in the jurisdictional statement of co-Defendants, PROVIDENCE HOSPITAL, IVANA VETTRAINO, M.D., and WILLIAM BLESSED, M.D.

615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

STATEMENT OF QUESTION PRESENTED

- I. IS PLAINTIFFS' CLAIM BARRED BY THE "WRONGFUL CONDUCT RULE" BECAUSE THEY SEEK RECOVERY FOR DAMAGES SUSTAINED IN THE COURSE OF A VOLUNTARY MEDICAL PROCEDURE WHICH IS PROHIBITED BY THE MICHIGAN PENAL CODE? (Co-Defendants' Argument F.)

The trial court answered, "No".

The Court of Appeals answered, "No".

Plaintiffs-Appellees contend the answer is, "No".

Defendants-Appellants contend the answer is, "Yes".

STATEMENT OF FACTS

Defendant-Appellant MICHAEL ROTH, M.D., concurs in the Statement of Facts contained in co-Defendants' Brief of Appeal.

ARGUMENT

- I. PLAINTIFFS' CLAIM IS BARRED BY THE "WRONGFUL CONDUCT RULE" BECAUSE THEY SEEK RECOVERY FOR DAMAGES SUSTAINED IN THE COURSE OF A VOLUNTARY MEDICAL PROCEDURE WHICH IS PROHIBITED BY THE MICHIGAN PENAL CODE. (Co-Defendant's Argument F.).

Defendant MICHAEL ROTH, M.D., concurs in Sections A.-G. of co-Defendants' Brief on Appeal. He submits this brief to elaborate upon the application of the "wrongful conduct rule" to the circumstances of the instant case.

Preservation

Defendants advance this issue as an alternative basis for finding that Plaintiffs' claim is unenforceable as a matter of law.

As the Court of Appeals' majority pointed out (91a), Defendants did not advance this argument in the trial court. However, the dissenting opinion expressed concern about allowing a tort recovery for damages resulting from a voluntary procedure which is illegal in Michigan. (96a n 6).

Although appellate courts generally require that an issue be presented to the trial court as a precondition to review, there are well-recognized exceptions to that rule:

"This court will review issues not raised below if a miscarriage of justice will result from a failure to pass on them [citation omitted], or if the question is one of law and all the facts necessary for its resolution have been presented [citation omitted], or where necessary for a proper determination of the case."

Providence Hospital v National Labor Union Health & Welfare Fund, 162 Mich App 191, 194-95 (1987). See also, e.g., Meek v Wilson, 238 Mich 679, 689-90 (1938) (questions of law, all facts in record); Spruyette v Owens, 190 Mich App 127, 132 (1991) (same).

The material facts are undisputed, since for purposes of appeal Defendants accept Plaintiffs' factual account. (3a-8a, 24a-28a). The issue presented is a question of law.

Also, if this Court were to decide that Plaintiffs' cause of action is not barred Taylor v Kurapati, 236 Mich App 315 (1999), resolution of this issue would be necessary for a proper determination of this case. Specifically, if this issue has merit, it should be addressed by this Court prior to remand. Otherwise, it is guaranteed that a final resolution of this case will require a second round of appeals regardless of the outcome below. In the worst case, a possibly pointless trial will take place in the process. Neither the parties (including Plaintiffs) nor the judicial system is well-served by such a potentially wasteful expenditure of time and resources. Therefore, this Court should consider this issue if necessary.

Standard of Review

The applicability of the "wrongful conduct rule" is a question of law subject to de novo review. See Poch v Anderson, 229 Mich App 40, 45 (1998); Stopera v DiMarco, 218 Mich App 565, 569-70 (1996), lv den, 455 Mich 853 (1997).

Discussion

Co-Defendants' brief sets forth in detail the many legislative enactments expressing this State's strong public policy against abortion. (Co-Defendants' Brief: Argument B., p 8-10).

Here, DR. ROTH will focus on one:

"Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case of the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

"In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed."

MCL 750.14.

The reach of that provision was circumscribed by the decision of the United States Supreme Court in Roe v Wade, 410 US 113; 93 Sup Ct 705; 35 L Ed 2d 147 (1973). This Court defined the post-Roe scope of the statute as follows:

"It is the public policy of the state to proscribe abortion. This public policy must now be subordinated to Federal Constitutional requirements.

"In light of the declared public policy of this state and the changed circumstances resulting from the Federal Constitutional doctrine elucidated in *Roe* and *Doe* we construe §14 of the penal code to mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; **however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment, to preserve the life or health of the mother.**"

People v Bricker, 389 Mich 524, 529-30 (1973) (emphasis added).

There is no allegation or indication whatsoever that the procedure that MRS. BARNES voluntarily underwent was necessary to preserve her life or health. To the contrary, Plaintiffs opted to terminate the pregnancy due to serious physical defects in the fetus. (6a, ¶30; 24a; 28a). It is beyond question that the procedure is illegal in Michigan. (28a). As such, voluntarily undergoing it cannot constitute the basis for a tort recovery in the courts of this State.

The elements and parameters of the "wrongful conduct rule" were most recently set forth by this Court in Orzel v Scott Drug Co, 449 Mich 550 (1995). Application of those elements to the instant case demonstrates conclusively that Plaintiffs' claim is barred by that doctrine.

First, the conduct in question must be prohibited or almost entirely prohibited under a penal or criminal statute. Orzel, supra at 561. The statute in question expressly prohibits the procedure involved here.

Second, the misconduct must be serious. (Id.). Cases have held that this requirement is satisfied, for example, by perjury, Pantley v Garris, Garris & Garris, P.C., 180 Mich App 768 (1989), lv den, 435 Mich 871 (1990), adultery, Morrison v McCann, 301 F Supp 2d 647 (ED Mich 2003), and unlawfully fleeing from the police, Robinson v City of Detroit, 462 Mich 439 (2000). There is no legitimate question but that the commission of a felony, with the concomitant violation of a public policy as strong as the one involved here, must qualify as "serious" for purposes of the doctrine.

Third, there must be a sufficient causal nexus between the wrongful conduct and the plaintiff's damage. Orzel, supra at 564. The operative test was set forth by this Court as follows:

"For a plaintiff to be barred of an action for negligent injury . . . his injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case."

Manning v Township of Marquette, 345 Mich 130, 136 (1956). Accord, Poch v Anderson, supra at 49.

Again, there is no question but that this element is satisfied. The gist of Plaintiffs' claim is that Defendants' alleged negligence deprived them of the opportunity to have a procedurally simple early abortion, and compelled them to go to Kansas for a more complicated procedure not legally available in Michigan. (28a). It is self-evident that the claimed injuries were "suffered while and as a proximate result of" the illegal medical procedure.

Plaintiffs cannot show their cause of action without proving the wrongful conduct.

Nor do either of the exceptions to the doctrine apply here.

One of those exceptions was characterized by this Court as follows:

"An exception to the wrongful-conduct rule may apply where both the plaintiff and defendant have engaged in illegal conduct, but the parties do not stand in *pari delicti*. In other words, even though a plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries, such as where the plaintiff has acted "under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age. . . ."

Orzel, supra at 569. That exception is facially inapplicable here, because there is no claim that any of the Defendants engaged in illegal conduct.

The other exception is as follows:

"The final relevant exception to the wrongful-conduct rule involves where the statute that the plaintiff alleges the defendant violated

allows the plaintiff to recover for injuries suffered because of the violation."

Orzel, supra at 570. That exception does not apply in the instant case, because there is no claim that the Defendants violated any statute.

In sum, Plaintiffs traveled to Kansas to undergo a medical procedure which is felonious in Michigan. They now seek to recover damages flowing directly from undergoing that illegal procedure. Allowing such a recovery in these circumstances would constitute judicial undermining of the Legislature's repeatedly articulated strong public policy. If the "wrongful conduct rule" is to apply in any situation, it certainly should apply here.

RELIEF REQUESTED

Defendant MICHAEL ROTH, M.D., prays this Honorable Court to REVERSE the decisions of the lower courts and either to ENTER JUDGMENT in his favor, or to REMAND to the trial court with instructions to do so.

GROSS, NEMETH & SILVERMAN, P.L.C.



BY: JAMES G. GROSS (P28268)

Attorneys of Counsel for
Defendant-Appellant

MICHAEL ROTH, M.D.

615 Griswold St., Ste. 1305

Detroit, MI 48226

(313) 963-8200

Dated: September 8, 2004

615 GRISWOLD, SUITE 1305 DETROIT, MICHIGAN 48226
(313) 963-8200

Notary Public: BARBARA A. LAMB
Macomb County, Michigan
My Commission Expires: 6/22/10
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